85-606

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NUMBER: _____
UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

DENNIS DORAN,
PETITIONER

V.

TRAVELERS INDEMNITY COMPANY,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
FROM THE ELEVENTH CIRCUIT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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912/487-5224
Counsel of record for the Petitioner

96 pp

QUESTION FOR REVIEW

1.

Does the denial of optional no-fault insurance benefits to Dennis Doran solely on the basis of the place of the issuance of the policy of insurance, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

LIST OF ALL PARTIES

All parties are named in the caption.

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Doran v. Travelers Indemnity Company, 254 Ga. 63, 326 SE2d 221 (1985).

All other opinions are unpublished.

JURISDICTIONAL STATEMENT

1.

The date of the judgment of the Eleventh Circuit Court of Appeals sought to be reviewed is August 8, 1985. The time of entry of said judgment was August 8, 1985.

2.

Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on August 8, 1985. There have been no extensions of time within which to file this Petition for Writ of Certiorari.

3.

The statutory provision believed to confer on this court jurisdiction to review the judgment of the Eleventh Circuit Court of Appeals by writ of certiorari is 28 U.S.C.A. § 1254(1).

JURISDICTIONAL STATEMENT

CONSTITUTIONAL PROVISIONS AND STATUTES

1.

Fourteenth Amendment to the United States Constitution, Section One: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2.

OCGA § 33-34-3 (Prior to 1984 Amendment) (a)(1) All policies of motor vehicle liability insurance issued in this state

CONSTITUTIONAL PROVISIONS AND STATUTES

1.

Fourteenth Amendment to the United States Constitution.

Section One: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2.

OCGA § 33-34-3 (prior to 1984 Amendment)

(a)(1) All policies of motor vehicle liability insurance issued in this state

must be in accordance with the requirements of this chapter; and no insurer shall issue a policy of motor vehicle liability insurance in this state that does not contain at least the minimum coverages required under this chapter.

(2) All insurers authorized to transact or transacting insurance in this state or controlling or controlled by or under common control by or with an insurer authorized to transact or transacting insurance in this state which issue policies or contracts providing motor vehicle liability insurance coverage or any other similar coverage in any state or Canadian province shall include in the policies or contracts of insurance a provision which provides at least the minimum coverage required under Code Section 33-34-4 with respect to motorists insured under the policies or contracts who are involved in motor vehicle

accidents in this state and, notwithstanding any provision of the policies or contracts to the contrary, all such policies or contracts of insurance shall be deemed to satisfy the minimum requirements of this chapter if a motorist insured under the policies or contracts of insurance is involved in a motor vehicle accident in this state.

(3) Nothing contained in this Code section shall be deemed to prohibit a nonadmitted insurer not otherwise required by paragraph (2) of this subsection to provide the minimum benefits required by Code Section 33-34-4 from providing such benefits for its insured motorists who are involved in motor vehicle accidents in this state and, to the extent that such benefits are provided, such policies or contracts shall be deemed to provide the minimum coverage required by this chapter.

(b) Nothing in Code Sections 33-34-4 and 33-34-5 shall be construed to prohibit the issuance of policies providing coverage more extensive than the minimum coverage required by those Code sections.

(c) Policies purporting to satisfy the requirements of Code Sections 33-34-4 and 33-34-5 shall contain a provision which states that, notwithstanding any of the other terms and conditions of the policy, the coverage afforded shall be at least as extensive as the minimum coverage required.

(d)(1) Insurers and self-insurers providing benefits without regard to fault described in Code Sections 33-34-4 and 33-34-5 shall not be subrogated to the rights of the person for whom benefits are provided except in those motor vehicle accidents involving two or more vehicles, at least one of which is a motor vehicle weighing more than 6,500 pounds unloaded.

The right of recovery and the amount of recovery shall be determined on the basis of tort law between the insurers or self-insurers involved. Expenses incurred in exercising the rights of subrogation under this Code section shall be at the sole expense of the insurers and self-insurers involved. If the responsible tort-feasor is uninsured or is not a self-insurer, the insurer or self-insurer providing benefits shall have a right of action to the extent of benefits provided against such tort-feasor only in the event that the person for whom benefits are provided has been completely compensated for all economic and noneconomic losses incurred as a result of the motor vehicle accident.

(2) Nothing contained in paragraph (1) of this subsection shall be deemed to increase or enlarge the bodily injury liability, personal injury protection, or

medical payments limits of any policy of motor vehicle liability insurance in this state.

(e) Each policy of liability insurance issued in this state providing coverage to motor vehicles owned by a person, firm, or corporation engaged in the business of selling at retail new and used motor vehicles shall provide that, when an accident involves the operation of a motor vehicle by a person who is neither the owner of the vehicle involved in the accident nor an employee of the owner and the operator of the motor vehicle is an insured under a complying policy other than the complying policy insuring the motor vehicle involved in the accident, primary coverage as to all coverages provided in the policy under which the operator is an insured shall be afforded by the policy insuring the said operator

and any policy under which the owner is an insured shall afford excess coverages.

OCGA § 33-34-4

(a) No owner of a motor vehicle required to be registered in this state or any other person, other than a self-insurer as defined in this chapter, shall operate or authorize any other person to operate the motor vehicle unless the owner has insurance on the vehicle providing the following minimum coverage:

(1) Motor vehicle liability insurance equivalent to that required as evidence of security for bodily injury and property damage liability under the motor vehicle safety responsibility laws of this state;

(2) Compensation to insured injured persons without regard to fault up to an aggregate minimum limit of $5,000 per insured injured person for;

(A) All necessary medical expenses, not to exceed $2,500.00, arising from a motor vehicle accident, including necessary medicine, drugs, and surgical, dental, X-ray, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services as prescribed, authorized, approved, or rendered by an attending physician, including any person licensed to practice a healing art and any remedial treatment and care rendered in accordance with a recognized religious healing method;

(B) Eighty-five percent of the loss of income or earnings during disability with a maximum benefit of $200.00 per week;

(C) Expenses, not to exceed $20.00 per day, reasonably incurred during a period of disability in obtaining ordinary and necessary services from others,

(A) All necessary medical expenses, not to exceed $2,500.00, arising from a motor vehicle accident, including necessary medicine, drugs, and surgical, dental, X-ray, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services as prescribed, authorized, approved, or rendered by an attending physician, including any person licensed to practice a healing art and any remedial treatment and care rendered in accordance with a recognized religious healing method;

(B) Sixty-five percent of the loss of income or earnings during disability with a maximum benefit of $200.00 per week;

(C) Expenses, not to exceed $10.00 per day, reasonably incurred during a period of disability in obtaining ordinary and necessary services from others,

excluding members of the injured person's household, in lieu of services that, had he or she not been injured, the injured person would have performed not for income but for the benefit of his or her household; and

(D) Funeral services and burial expenses not to exceed $1,500.00 per person.

(b) In the event of the death of the injured person who is survived by a spouse or dependent child or children, compensation under subparagraphs (A)(2)(B) and (a)(2)(C) of this Code section shall be payable after the death as though the deceased were alive but totally disabled, the payment to be made to the spouse, if alive, and otherwise to the child or children or the person having legal custody of any child or children or the person having legal custody of any child or children for use of the spouse or

children as though awarded as a year's support for the spouse or children, or both. Survivor's benefits shall be payable at least monthly until exhausted. (c) The total benefits required to be paid under this Code section without regard to fault as the result of any one accident shall not exceed the sum of $5,000.00 per each individual covered as an insured person or such greater amount of coverage as has been purchased on an optional basis as provided in Code Section 33-34-5, regardless of the number of insurers providing such benefits or of the number of policies providing such coverage.

OCGA § 33-34-5: (prior to 1982 amendment) (a) Each insurer shall also make available on an optional basis the following coverage:

(1) An aggregate limit of benefits payable without regard to fault up to $50,000.00 per person, which may be rejected or reduced to not less than an aggregate limit of benefits payable without regard to fault of $5,000.00 per person by written consent of the policyholder. Benefits purchased in excess of $5,000.00 shall be paid as determined by the insured without apportionment to cover any of the following expenses incurred by the insured but not compensated for under paragraph (2) of subsection (a) of Code Section 33-34-4:

(A) Any expenses of the type described in subparagraph (a)(2)(A) of Code Section 33-34-4;

(B) Eighty-five percent of the loss of income or earnings during disability;

(I) An appropriate limit of benefits payable without regard to fault up to $50,000.00 per person, which may be rejected or reduced to not less than an appropriate limit of benefits payable without regard to fault of $5,000.00 per person by written consent of the policyholder. Benefits purchased in excess of $5,000.00 shall be paid as determined by the insured without apportionment to cover any of the following expenses incurred by the insured but not compensated for under paragraph (2) of subsection (a) of Code Section 33-34-4:

(A) Any expenses of the type described in subparagraph (a)(2)(A) of Code Section 33-34-4;

(B) Eighty-five percent of the loss of income or earnings during disability;

(C) Expenses of the type described in subparagraph (a)(2)(C) of Code Section 33-34-4, not to exceed $20.00 per day; and

(D) Funeral services and burial expenses not to exceed $2,000.00 per person:

(2) In the event of the death of the injured person who is survived by a spouse or dependent child or children, compensation under subparagraphs (a)(2)(B) and (a)(2)(C) of Code Section 33-34-4 shall be payable after the death as though the deceased were alive but totally disabled, the payment to be made to the spouse, if alive, and otherwise the child or children or the person having legal custody of any child or children for use of the spouse or children as though awarded as a year's support for the spouse or children, or both. Survivor's benefits shall be payable at least monthly until exhausted;

(3) Compensation without regard to fault for damage to the insured motor vehicle not to exceed the actual cash value of the vehicle at the time of the loss, including up to $10.00 per day with a maximum of $300.00 for the loss of use of the motor vehicle, provided that benefits payable under this paragraph may be subject to deductibles at the written election of the policyholder.

(b) Each application for a policy of motor vehicle liability insurance sold in this state must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section and no such policy shall be issued in this state unless these spaces are completed and signed by the prospective insured.

(c) On and after March 1, 1975, all named insureds in existing motor vehicle

(3) Compensation without regard to fault for damage to the insured motor vehicle not to exceed the actual cash value of the vehicle at the time of the loss, including up to $10.00 per day with a maximum of $300.00 for the loss of use of the motor vehicle, provided that benefits payable under this paragraph may be subject to deductibles at the written election of the policyholder.

(b) Each application for a policy of motor vehicle liability insurance sold in this state must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section and no such policy shall be issued in this state unless these spaces are completed and signed by the prospective insured.

(c) On and after March 1, 1975, all named insureds in existing motor vehicle

liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this chapter shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this Code section; provided, however, that the failure of an insured to notify his insurer of his written acceptance or rejection within 30 days after written notice of the offer has been mailed by the insurer, postage prepaid, by first class mail to the address stated in the policy shall constitute a rejection of the optional coverage.

(d) The optional coverage required to be offered under this Code section need not be offered upon the renewal of any policy where the offer has been previously made by the same insurer and has been rejected in accordance with this Code section

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(d) The optional coverage required to be offered under this Code section need not be offered upon the renewal of any policy where the offer has been previously made by the same insurer and has been rejected in accordance with this Code section

unless the named insured requests that coverage in writing.

STATEMENT OF THE CASE

Dennis Doran was employed by James I. O'Quinn at the time of his injury. His employer owned and operated a business with locations in Jacksonville, Florida and in Waycross, Georgia. A 1974 van owned by James I. O'Quinn was garaged in Georgia and was used by Petitioner in connection with Mr. O'Quinn's business in Waycross, Georgia. When Mr. James I. O'Quinn opened the office in Waycross, Georgia in 1979, an endorsement was issued by Respondent to cover the 1974 Van under Georgia Law as said van was principally garaged in and used in Georgia. On December 6, 1979, Petitioner, a Georgia resident, while operating the 1974 Van in the course of his employment with James I. O'Quinn, was involved in an collision in Clinch County, Georgia and suffered serious injuries. Pursuant to Jones v. State Farm Mutual Auto Insurance Company,

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Dennis Doran was employed by James I. O'Quinn at the time of his injury. His employer owned and operated a business with locations in Jacksonville, Florida and in Waycross, Georgia. A 1974 van owned by James I. O'Quinn was garaged in Georgia and was used by Petitioner in connection with Mr. O'Quinn's business in Waycross, Georgia. When Mr. James I. O'Quinn opened the office in Waycross, Georgia in 1973, an endorsement was issued by Respondent to cover the 1974 Van under Georgia Law as said van was principally garaged in and used in Georgia. On December 6, 1973, Petitioner, a Georgia resident, while operating the 1974 Van in the course of his employment with James I. O'Quinn, was involved in an collision in Clinch County, Georgia and suffered serious injuries. Pursuant to Jones v. State Farm Mutual Auto Insurance Company,

156 Ga. App. 230, 274 S.E.2d 623 (1980) and Flewellen v. Atlanta Casualty Co., 250 Ga. 709, 300 S.E.2d 673 (1983), the continuing offer for the maximum no-fault benefits of $50,000 was accepted by Petitioner. Petitioner claimed additional benefits pursuant to the decision in the Jones case as there had been no rejection of optional no-fault insurance benefits as required by Georgia law. Under the Jones decision and upon demand and tender of the premium, all Georgia no-fault insurers had to pay optional no-fault insurance benefits where the insurer had failed to obtain written rejection of such benefits from the insured as required by Georgia law.

Respondent admitted receiving demand for the optional no-fault benefits on April 6, 1982, but denied liability for the same and suit was instituted in the Superior Court of Clinch County, Georgia

by the Petitioner herein. The case was removed by the Respondent to the Southern District of Georgia, Waycross Division based on diversity jurisdiction. Petitioner filed a motion for summary judgment on the issue of entitlement to the maximum optional no-fault insurance benefits. Respondent filed a motion for summary judgment as it contended it was not liable for the optional benefits. Summary judgment was granted in favor of Respondent by the District Court on all issues. A timely appeal was taken to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals certified certain questions to the Georgia Supreme Court which answered the same in favor of the Respondent. Petitioner filed a Petition for rehearing and a suggestion for rehearing en banc in the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals

subsequently vacated its decision of April 30, 1985, as it had failed to address one of the issues presented by the Petitioner herein. In its August 8, 1985 decision, the Eleventh Circuit Court of Appeals affirmed the District Court's grant of summary judgment to the Respondent herein.

Petitioner raised the questions of denial of equal protection under both the Georgia and the United States Constitutions in the District Court and in the appeal and petition for rehearing en banc to the United States Court of Appeals for the Eleventh Circuit.

Petitioner contended that under the applicable Georgia law, including statutory and case law, the minimum coverage to be provided by any insurer (absent express rejection by the insured) was $50,000. Respondent argued and the courts below found that maximum optional no-fault coverage could not be extended to

Georgia residents on a vehicle garaged in Georgia if the policy covering the vehicle was issued in another state. Petitioner argued that there was no legitimate reason to discriminate between persons, including residents of Georgia, on the basis of where insurance policies were issued. Therefore, Petitioners were denied equal protection and due process of the law by the Supreme Court of Georgia's answer to the Eleventh Circuit Court of Appeals certified questions and the decision of the Eleventh Circuit Court of Appeals based on the answers to those questions.

Georgia residents on a vehicle garaged in Georgia if the policy covering the vehicle was issued in another state. Petitioner argued that there was no legitimate reason to discriminate between persons, including residents of Georgia, on the basis of where insurance policies were issued. Therefore, Petitioners were denied equal protection and due process of the law by the Supreme Court of Georgia's answer to the Eleventh Circuit Court of Appeals certified questions and the decision of the Eleventh Circuit Court of Appeals based on the answers to those questions.

ARGUMENT

The Eleventh Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. The petitioner herein was denied equal protection and due process under the laws by the decision of the Eleventh Circuit Court of Appeals affirming the grant of summary judgment to the Respondent.

To deny a Georgia resident the same protection under a Georgia statute which is afforded to another Georgia resident, merely because of the place which an insurance policy was issued, is clearly a denial of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. There is no legitimate state objective in minimizing administrative burdens on foreign insurers to the detriment of Georgia residents who must bear the cost

ARGUMENT

of uninsured injuries. The intent of Chapter 34 of the Official Code of Georgia Annotated is to secure injured individuals from economic losses arising from injury suffered in an automobile accident and to facilitate the reimbursement of those losses. 1975 Op. Georgia Att'y Gen. No. 75-115. The act provides for benefits to be paid to persons injured or their relatives who are household members, or any persons in an insured vehicle who are injured in an automobile accident anywhere in the United States or Canada and to any pedestrian injured by an insured owner's vehicle.

The intent, then, is not merely to protect persons injured under policies issued in Georgia, and not even just Georgia residents. The protection also extends to any persons injured as pedestrians in Georgia. If the intent, therefore, is to protect such individuals,

certainly the extent of protection should not be subject to the place of issuance of a policy, but, rather that as many persons receive the fullest coverage as possible.

Under Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673 (1983), and the Georgia Motor Vehicle Accident Reparations Act, O.C.G.A. § 33-34-1 et. seq., the minimum coverage to be provided by any insurer (absence express rejection by the insured) was $50,000. Any contrary interpretation discriminates between persons, including residents of the State of Georgia, solely on the basis of where their insurance policies were issued. Such discrimination cannot be deemed rationally related to any legitimate objective and is therefore violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Dennis Doran, a driver (and Georgia resident) of a vehicle

subject to a Georgia endorsement of a Florida issued policy, on a vehicle garaged in Georgia, should not be given less coverage than a fellow resident whose policy was issued within the state. The purpose of the statute is clearly to protect injured persons. There is no indication that the legislature intended to deny equal opportunity for coverage.

The state has no legitimate objective in relieving foreign insurers, such as Travelers who does business on a national basis, of the task of keeping up with developements in Georgia law. Travelers has chosen to do business in the State of Georgia and the fact that it had its own printed endorsement form relating to Georgia law indicates that it is part of its business to keep abreast of the laws of a state in which it chooses to transact business. In the case of Hague

v. Allstate Insurance Company, 289 N.W.2d 43 (Minn. 1979), that court found:

> When an insurance company doing business in a number of states writes a policy on an automobile, the company knows that the automobile is a movable item which will be driven from state to state. The company, therefore, accepts the risk that the insured may be subject to liability not only in the state where the policy is written, but also in states other than where this policy is written, and that in many instances those states will apply their own law to the situation.

In the instant matter, Travelers knew in advance that the vehicle would not only be driven but also be garaged in Georgia, and adjusted the policy accordingly. Thus, to deny Doran the same coverage which his neighbor would have on the mere fact that the policy (even though it was endorsed for Georgia) was issued in Florida could not bear any rational

relation to the clear purpose of the statute, and would be in violation of the United States Constitution. Only if a statutory classification is rationally related to a permissible state objective may it be held constitutional. Parham v. Hughes, 441 U.S. 347 (1979).

In a case similar to the present one, the Supreme Court upheld a state insurance statute against an equal protection challenge by out-of-state insurers because the statute applied to all insurers whether within or outside the state. In Watson v. Employers Liability Assurance Corp., 348 U.S. 166 (1954), an injury occurred in Louisiana. The injured party sought to sue the insurer directly, which was permitted by state law. The insurer relied on the terms of the policy, which incorporated Massachusetts and Illinois law, where the policy was negotiated, issued, and delivered.

Thepolicy and the latter state's laws prohibited suit against the insurer until the liability of the insured was made final by judgment or agreement. The Court held that the Louisiana statute would withstand an equal protection attack because the statute applied equally to all insurers, whether within or outside the state. Id. at 170. Watson suggests that statutes which treat foreign insurers differently than insurers within the state would violate equal protection guarantees.

This is precisely the problem with the statute in this case. Foreign insurers, even though authorized to do business in Georgia, are treated differently than domestic insurers. As a result, Georgia residents, like Doran, are treated differently because of the place of issuance of their policies. There is no legitimate objective to be accomplished by these distinctions where the purpose of

Chapter 34 of Title 33 of the Official Code of Georgia, is to compensate injured Georgia residents. Even if the reduction of administrative burdens on foreign insurers is a legitimate state goal, the means employed (the distinction based on the place of issuance of the policy) is not rationally related to that end. In this case, a special Georgia endorsement was issued even though the policy was issued in Florida. In this day and time of multi-state operations, companies are accustomed to complying with different state laws on a daily basis. Any contrary statutory provision fails to survive scrutiny on an equal protection challenge. If the Court were to hold that the statute violated equal protection as applied in this case it would not render that statute invalid: "a court may avoid a portion of the enactment and preserve the remainder". Gazen v. Heery, 13 Ga. 30, 187 S.E. 371

(1936). The concept of partial invalidity has been widely applied, and the "tendency of the courts is to apply the principle with increasing liberality. 16 Am. Jur. 2d "Constitutional Law" § 260 (1979).

Only by invalidating the statute to the extent that it treats members of the same class differently based solely on the place of issuance of the policy may any part of the statute be upheld under equal protection analysis. The court then may apply the remaining provisions of the statute still reflecting the intended purpose of the legislature and impose the same minimum coverage upon Travelers in this case as would be in a case arising from a policy issued within Georgia.

The reduction of administrative burdens on foreign insurance companies is not a legitimate state goal where the clear purpose of the Georgia no-fault law is to protect Georgia residents from

uncompensated injury and where there is no indication of any additional burden that is not already experienced as a result of doing business in Georgia. Even if this court finds a legitimate objective, the means: disparate treatment of foreign versus domestic insurers, is not rationally related to that end. There is no rational basis for the denial of optional PIP benefits to Dennis Doran because Travelers Indemnity Company issued the policy outside this state, rather than within it. This classification violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution and must fail.

CONCLUSION

Petitioner requests that this Court issue a writ of certiorari to hear and decide the Petitioner's claim for the

maximum no-fault benefit coverage of $50,000.

RESPECTFULLY SUBMITTED, this 4th day of October, 1985.

BERRIEN C. SUTTON

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APPENDIX

1.

Opinions, orders, findings of fact and conclusions of law delivered upon rendering of the decision of the Eleventh Circuit Court of Appeals:

(a) Order on Petition for Rehearing and Suggestion for Rehearing En Banc:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8566

DENNIS DORAN,

Plaintiff/Appellant

versus

TRAVELERS INDEMNITY COMPANY,

Defendant/Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 30, 11 Cir., 1985 _____ F.2d _____).

(August 8, 1985)

Before KRAVITCH, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The petition for rehearing is DENIED and no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedures; Eleventh Circuit Rule 26), the Suggestion for Rehearing en banc is DENIED.

(b) Order of Stay of the issuance of the mandate:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8566

DENNIS DORAN,

Plaintiff/Appellant

versus

TRAVELERS INDEMNITY COMPANY,

Defendant/Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ORDER:

The motion of Appellant Dennis Doran for stay and Stay of the issuance of the mandate pending petition for writ of certiorari is granted to and including October 7, 1985, the Stay to Continue in force until the final disposition of the case by the Supreme Court, provided that within the period above-mentioned, there shall be filed with the Clerk of this

Court, the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the Stay granted herein, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/PHYLLIS KRAVITCH
UNITED STATES
CIRCUIT JUDGE

U. S. Court of Appeals
Eleventh Circuit, filed
August 19, 1985, Spencer
D. Mercer, Clerk

2.

Opinions, Orders, Findings of Fact and Conclusions of Law rendered by courts the case:

(a) Decision of the District Court of the Southern District of Georgia:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

DENNIS DORAN,	:	CIVIL ACTION
Plaintiff,	:	
V.	:	
TRAVELERS INDEMNITY,	:	
COMPANY,	:	
Defendant.	:	NO: 582-69

ORDER

The Plaintiff brought this action against the Travelers Indemnity Company ("Travelers") to recover under the no-fault provisions of an automotive insurance policy issued to the Plaintiff's employer. The case is presently before

this Court on cross-motions for summary judgment.

FACTS

The record shows that the insured, James O'Quinn, is the owner and operator of an electrical repair business. The business is primarily located in Jacksonville, Florida, but has expanded to serve parts of southeast Georgia. O'Quinn has insured the vehicles used in such operations with the Travelers, as represented through their local agents in Jacksonville, Florida.

This suit arose out of a dispute over the extent of coverage on a vehicle. The policy in question was issued out of Jacksonville, but the parties understood that the vehicle would be used in Georgia. The policy contained, inter alia, a Georgia endorsement for no-fault coverage, as well as a provision entitled "Out of State Extension of Coverage" which

purported to increase the policy's minimum coverage to match the limits specified by another state's compulsory insurance laws.

On December 6, 1979, Dennis Doran, the Plaintiff in this case, was involved in an automobile accident while driving the covered vehicle in Homerville, Georgia. Initially, Plaintiff filed for $5,000 in basic no-fault benefits. These were paid after a protracted period during which Defendant refused payment. Plaintiff is contending that this refusal to pay amounts to bad faith on the part of the insurer and, thus, he is entitled to the statutory penalty and attorney's fees. Plaintiff's main contention in this suit, however, is that he is entitled to $45,000 in additional no-fault benefits under Georgia's Motor Vehicle Reparations Act, as construed in Jones v. State Farm Ins. Co., 156 Ga. App. 230, 270 S.E. 2d 623 (1980), and Flewellen v. Atlanta

Casualty Co., 250 Ga. 709, 300 S.E.2d 673 (1983).

DISCUSSION

A. Claim of Bad Faith on the Part of the Insurer in Failing to Pay Benefits

Plaintiff asserts that Defendant is liable for attorney's fees and penalty damages for failure to pay basic no-fault benefits upon application by the Plaintiff.[1] The record before the Court reveals that Defendant received the application for basic no-fault benefits on December 8, 1980, and refused payment thereon on January 30, 1981. Plaintiff does not controvert the assertion of the

[1] Plaintiff also claims he is entitled to bad faith damages for Defendant's refusal to pay the $45,000.00 in optional no-fault benefits under Flewellen. Based on the same legal authority discussed above, this Court finds no bad faith. The uncertainty as to the application of Georgia no-fault law to the policy in question was sufficient grounds for the Defendant to contest coverage.

Defendant that, in denying the Plaintiff's application for benefits, it relied upon the Court of Appeals decision in Boston Old Colony Ins. Co. v. Brown, 155 Ga. App. 767, 272 S.E.2d 755 (1980).

The Plaintiff seeks the penalties provided for in O.C.G.A. § 33-34-6(b):

> In the event the insurer fails to pay each benefit when due, the person entitled to the benefits may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25% of the amount due and reasonable attorney's fees.

The meaning of this provision was thoroughly discussed in Georgia Farm Bureau Mutual Ins. Co. v. Matthews, 149 Ga. App. 350, 254 S.E.2d 413 (1979). There, the court reversed a jury verdict granting bad faith damages as being improper. The Court's discussion provides

a succinct statement of the law of bad faith damages in Georgia:

> This issue here is whether the question of good or bad faith should have been submitted to the jury. In construing §56-3406b, this Court has held, citing Bituminous Cas. Corp. v. Mowery, 145 Ga. App. 45 (244 SE2d 573), that "ordinarily, the determination of 'good or bad faith of the insurer is for the jury.'" Miller v. Spicer, 147 Ga. App. 759 (250 SE2d 492). In Bituminous Cas. Corp., supra, this court held, without using the word "ordinary," that the issue is one for the jury. However, that statement must not be taken for a holding that there are no instances in which the issue is one of law for the court. The cases cited in Bituminous Cas. Corp. in support of that proposition hold, for the most part, that under the evidence in those cases, the issue is one for the jury. One of the cases cited, however, contains a holding most appropriate for this case: "Though ordinarily these are questions for the jury, if there is no evidence of such frivolous or unfounded refusal to pay, or if the question of liability is a close one, the court for the furtherance of justice should see to it that a verdict which

> illegally carries a penalty for bad faith is not allowed to stand." Pearl Assur. Co. v. Nichols, 73 Ga. App. 452, 455 (37 SE2d 227). (Emphasis added.)

Georgia Farm Bureau states that, where there is no evidence of a frivolous or unfounded refusal to pay, it is the duty of the Court to dispose of the bad faith damages claim. In the instant case, the plaintiff was already receiving workers' compensation benefits under his employer's compensation policy at the time his application for basic no-fault benefits was denied. Under the then-existing law as construed by the Georgia Courts, an employee who was injured in a job-related car accident was prohibited from receiving no-fault benefits under his employer's automotive policy if he was collecting workers' compensation from the same employer. Freeman v. Ryder Truck Lines, 244 Ga. 80,

259 S.E.2d 36 (1979); Boston Old Colony Ins. Co. v. Brown, supra. These cases rested firmly upon the theory that to permit such double recovery would create a favored class of employees in violation of the equal protection clause.

The equal protection logic was repudiated by the Georgia Supreme Court in the appeal from the Boston Old Colony case. This, however, occurred after the defendant relied on the Court of Appeals' decision to deny the basic no-fault benefits. Under these circumstances, bad faith damages cannot be properly awarded. See Government Employees Ins. v. Mooney, 250 Ga. 760 (1983).

Plaintiff, in opposition to the defendant's motion for summary judgment on the bad-faith issue, further argues that a statutory revision (O.C.G.A. § 33-34-8) is sufficient to create a factual issue for the jury. This revision sought to clarify the legislature's intent of permitting

simultaneous receipt of both types of benefits. The Plaintiff overlooks the fact that the revision occurred one full year before the Court of Appeals' decision relied on by the defendant. Moreover, that Court's decision rested on the equal-protection theory adopted by the Supreme Court of Georgia in Freeman, and not on any construction of legislative intent. Thus, the defendant was fully justified in its reliance on the Boston Old Colony decision.

Since the record reflects no evidence of any frivolous or unfounded refusal to pay, the defendant's motion for summary judgment on the issue of bad faith damages is GRANTED.

B. Claim that Plaintiff is Entitled to $45,000 in Optional No-Fault Benefits

Plaintiff contends that O.C.G.A. §§ 33-34-3 and 33-34-5 requires the policy

in question to have $50,000 in optional no-fault benefits, rather than the basic $5,000 coverage, because the insurer failed to comply with the written rejection requirement of Flewellen v. Atlanta Cas. Co., supra. Flewellen held that, absent the execution of two separate signatures accepting or rejecting two types of insurance coverage, a continuing offer for the $50,000.00 optional coverage was created and could be accepted by the insured at any time upon the tendering of the additional premium. Travelers does not contest the fact that the policy in question here did not contain the two signatures, one for acceptance or rejection of optional no-fault coverage and another to indicate acceptance or rejection of vehicle damage coverage. Thus, if Flewellen applies to the policy at hand the plaintiff's motion for summary

judgment for $45,000 in additional no-fault benefits must be granted.

The plaintiff contends that Flewellen applies to every insurer who is authorized to do business in Georgia and who issues a policy sued upon to recover for injuries sustained in Georgia. Plaintiff does not stress the geographic origin of the policy. A closer examination of Georgia's statutory scheme for minimum no-fault coverage proves this interpretation to be erroneous.

In Flewellen, the court was called upon to interpret O.C.G.A. § 33-34-5, which mandates the offer of $50,000 in optional no-fault coverage. Flewellen did nothing more than decide the manner in which such optional coverage must be offered. The case did not purport to define the precise parameters of when such optional coverage must be offered. This question was not addressed in

Flewellen because, there, the insured and insurance agent both were in the State of Georgia. This Court's conclusion, that the minimum coverage requirement of the statute turns upon whether or not the policy is issued in the State of Georgia, is supported by the literal reading of the statute which makes this distinction. O.C.G.A. § 33-34-3 (a) provides:

> (1) All policies of motor vehicle liability insurance issued in this state must be in accordance with the requirements of this chapter; and no insurer shall issue a policy of motor vehicle liability insurance in this state that does not contain at least the minimum coverages required under this chapter...
>
> (2) All insurers authorized to transact or transacting insurance in this state... which issue policies or contracts providing motor vehicle liability insurance coverage or any other similar coverage in any other state or Canadian province shall include in the policies or contracts of insurance a provision which provides at least the minimum coverage

> required under Code Section 33-34-4 with respect to motorists insured under the policies or contracts who are involved in motor vehicle accidents in this state and, notwithstanding any provisions of the policies or contracts to the contrary, all such policies or contracts of insurance shall be deemed to satisfy the minimum requirements of this chapter if a motorist insured under the policies or contracts of insurance is involved in a motor vehicle accident in this state.

Under §33-34-3(a)(1), all policies issued in Georgia must be in accordance with the requirements of this chapter. These requirements include §33-34-5, the offer of $50,000 optional no-fault coverage requirement. Indeed, §33-34-5(b) expressly states that the separate signature requirement of acceptance or rejection of the optional coverage applies to policies sold in this state. Nothing is provided for policies <u>not</u> sold in Georgia. The <u>Flewellen</u> court itself

stated that the language of §33-34-5(b) was central to the resolution of the issues before it. Thus, Flewellen's continuing-offer principle is inapplicable to policies that are not sold in the State of Georgia.

More central to the Court's resolution of this case is §33-34-3(a)(2). This Code Section deals with the no-fault requirements of policies not issued in the State of Georgia. This provision, by stating "shall include a provision which provides at least the minimum coverage required under §33-34-4 [the $5,000 basic no-fault provision]," means that a policy not issued in Georgia is not required to meet the mandate of §33-34-5 as construed by Flewellen. This conclusion is not changed by the additional language of the provision which states that "notwithstanding any provisions to the contrary, all such policies...shall be

deemed to satisfy the minimum requirements of this chapter...." This additional language merely serves to state that the minimum $5,000 no-fault coverage will be deemed to be part of the policy irrespective of what the actual policy provided. Moreover, if the interpretation by the Plaintiff were accepted, the separate statutory provisions for in-state policies and all others would be redundant. The care which the legislature took in delineating different provisions for in-state policies and all others must be respected. Accordingly, this Court finds that the $50,000 optional coverage requirement of §33-34-5 does not apply to policies which are not issued in the State of Georgia.

The record reflects, without serious controversy, that the policy in question was issued through a Jacksonville, Florida, insurance agency on

behalf of Travelers and was delivered to a Jacksonville resident. This fact compels the Court to find that the policy was not issued in the State of Georgia. Plaintiff's contention that the policy might have been sent from the Traveler's southeast headquarters in Atlanta, Georgia, is without merit, because a finding that this supported an "issued in Georgia" conclusion would mean that all of Traveler's policies in the southeast were "issued" in Georgia.

The foregoing analysis of §33-34-3(a)(2), as applied to a policy not issued in the State of Georgia, leads this Court to conclude that the plaintiff is not entitled to $45,000 in optional no-fault benefits.

As a final argument, plaintiff contends that the insurance policy itself extends coverage beyond that required by the statute, because it contains a

provision entitled "Out of State Extension of Coverage." In essence, this provision states that the coverage under the policy would be "at least as extensive as required under the Georgia Motor Vehicle Accident Reparations Act." Plaintiff's argument disregards the interpretation of this Court that the minimum no-fault coverage required for policies not issued in Georgia is $5,000. Thus, the policy proviso merely restates that which the law would otherwise require. The provision is a mere attempt to conform the policy to out-of-state statutes that govern the coverage requirements for vehicles involved in motor vehicle accidents in that state.

CONCLUSION

It is the conclusion of this Court, based on the foregoing analysis, that the defendant is entitled to judgment as a matter of law in that it exhibited no

bad faith in denying plaintiff's claimed benefits and, further, that the policy limits on no-fault benefits were properly fixed at $5,000. Accordingly, the plaintiff's motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED. The Clerk of the Court is directed to enter an appropriate judgment in favor of the defendant, Travelers Indemnity Company. CLERK.

SO ORDERED, this 29th day of June, 1983.

/s/ANTHONY A. ALAIMO
CHIEF JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

B. Decision of the Supreme Court of Georgia on certified questions from the Eleventh Circuit Court of Appeals:

In the Supreme Court of Georgia

Decided: Feb. 27, 1985

41550. DORAN V. TRAVELERS INDEMNITY COMPANY

GREGORY, Justice.

Dennis Doran (Doran) filed suit against Travelers Indemnity Company (Travelers) in Clinch Superior Court. Travelers removed the case to the United States District Court for the Southern District of Georgia. Summary judgment for Travelers was granted by the District Court and Doran appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit concluded the case presented important issues of Georgia law, determinative of the cause, but without precedent in the decisions of this court. Four certified questions have been presented pursuant to our rule 37. These questions relate to the Georgia

Motor Vehicle Accident Reparations Act (commonly known as the No-Fault Automobile Insurance Act, OCGA § 33-34-1, et. seq., or simply "no-fault").

The facts have been carefully and completely stated by the Eleventh Circuit. We quote in part and paraphrase in part:

"(Doran), a Georgia resident, brought this action against (Travelers), which is authorized to do business in Georgia, to recover benefits under the no-fault provisions of an automotive insurance policy issued to his employer. In 1974 the insured, James O'Quinn, a Florida resident doing business as O'Quinn Automotive Electrical, owned and operated an electrical repair shop principally located in Jacksonville, Florida. In November of that year, O'Quinn obtained an insurance policy with Travelers, through the company's local agent in Jacksonville,

covering vehicles garaged in Jacksonville and used in the business.

"On October 29, 1979, O'Quinn opened a branch facility in Waycross, Georgia, and added at least one vehicle to the policy, a 1974 van. The van was garaged in Waycross and was used by Doran in connection with O'Quinn's business. Although the van was registered in Florida, the parties understood that it would be used primarily in O'Quinn's Georgia operations.

"In response to the addition of the Georgia vehicle, Travelers delivered to O'Quinn a Georgia endorsement for basic no-fault coverage. The record does not indicate whether the endorsement was delivered to the business address in Georgia or Florida or to the residence of O'Quinn in Florida. The endorsement stated, in part:

> Notwithstanding any of the other terms and conditions of the policy, the coverage afforded shall be at least as extensive as the minimum coverage required by the Georgia Motor Vehicle Accident Reparations Act....

The original policy contained a similar provision, entitled 'Out-of-State Extension of Coverage,' which purported to increase the policy's minimum coverage to match the requirements specified by another state's compulsory insurance laws:

> While covered auto is away from the state where it is licensed we [the 'insurer'] will: (a) increase this policy's liability limits to meet those specified by a compulsory or financial responsibility law in the jurisdiction where the covered auto is being used. (b) provide the minimum amounts and types of other coverages, such as 'No-fault,' required of out of state vehicles by the jurisdiction where the covered auto is being used.

On December 6, 1979, Doran, while driving the van in Clinch County, Georgia, had a collision and suffered serious injuries. Because the accident arose in the course

of his employment, Doran applied for and immediately began receiving workers' compensation benefits under his employer's workers' compensation policy with Travelers. On December 8, 1980, Doran presented claims to Travelers for uninsured motorist benefits and $5,000 in benefits under OCGA §33-34-1 and 33-34-3 (A)(2) for basic no-fault coverage, also known as personal injury protection (PIP). Because under Georgia law an insurer must provide uninsured motorist protection on all insured vehicles garaged in Georgia, Travelers promptly paid the uninsured motorist part of Doran's claim. On January 30, 1981, however, it refused to pay the basic PIP benefits because Doran was already receiving payments under O'Quinn's workers' compensation policy. The company relied upon the September 19, 1980, Georgia Court of Appeals' decision in Boston Old Colony Ins. Co. v. Brown,

155 Ga. App. 767, 272 SE2d 755 (1980), which held that an employee injured in an automobile accident could not collect no-fault benefits under his employer's automotive policy if he had received workers' compensation benefits from the same employer.

"On March 12, 1981, six weeks after Travelers refused to pay Doran's PIP claim, the Supreme Court of Georgia reversed the Court of Appeals' decision, Brown v. Boston Old Colony Ins. Co., 247 Ga. 287, 275 SE2d 651 (1981), and held that an employee could collect a reduced amount of no-fault PIP benefits even if he had collected disability benefits under his employer's workers' compensation coverage. The court stated that an earlier opinion which the Court of Appeals had followed, Freeman v. Ryder Truck Lines, Inc., 244 Ga. 80, 259 SE2d 36 (1979), was no longer applicable because

it was decided under the Georgia Motor Vehicle Accident Reparations Act as it existed prior to an April 1979 amendment to section 33-34-8, which now provides that an employee may recover no-fault benefits reduced to a limited extent by the amount he collected as workers' compensation. Travelers thus refused payment of the basic PIP benefits after the statute had been amended but before the Supreme Court had reviewed the Court of Appeals' decision in Boston Old Colony.

"On April 8, 1982, more than one year after the Supreme Court's decision in Boston Old Colony, Doran renewed his claim for basic PIP. The company promptly paid the $5,000 on April 16, 1982. The record shows that although Travelers was aware of the Supreme Court's reversal at least within 'several months' of the decision, it never notified Doran of the change in the law. The company asserts that by the

time it became aware of the decision, the file on Doran's claim had been 'closed out. Doran maintains that Travelers' failure to pay his claim or notify him within thirty days of the Supreme Court decision constituted a bad faith refusal to pay a claim under OCGA § 33-34-6.

"In his April 1982 claim, the plaintiff also sought $45,000 additional PIP benefits under OCGA §§33-34-3(a)(2) and 33-34-5, pursuant to Jones v. State Farm Mutual Automobile Ins. Co., 156 Ga. App. 230, 274 SE2d 623 (1980), cert. dismissed, 248 Ga. 46, 280 SE2d 837 (1981), which held that a policyholder may elect an additional $45,000 in PIP coverage at any time, even after the accident has occurred, unless the insurer can demonstrate that it provided the policyholder with an opportunity in writing to accept or reject the optional

coverage. The parties agree that O'Quinn was afforded no such opportunity.

The Eleventh Circuit's statement of facts goes on to point out that Jones, supra, was later overruled by Van Dyke v. Allstate Ins. Co., 164 Ga. App. 885 (300 SE2d 166) (1982), but its holding was reinstated by this court in Flewellen v. Atlanta Casualty Co, 250 Ga. 709 (300 SE2d 673) (1983). The statement of facts then concludes:

"Doran brought this suit in the Superior Court of Clinch County, Georgia, and the defendant removed the case to federal district court. The complaint sought $45,000 in optional PIP benefits, and punitive damages, penalty and attorney's fees for bad faith delay in paying basic PIP benefits. The district court granted summary judgment for the defendant and Doran has appealed."

1. The first of the four questions is: "Did the Travelers act in good faith as a matter of law so as to avoid the sanctions of OCGA § 33-34-6, [1] when it relied upon Boston Old Colony Ins. Co. v. Brown, 155 Ga. App. 767 (272 SE2d 755) (1980), as a basis for refusing to pay basic no-fault insurance benefits, and, when that case was reversed six weeks after the refusal, it failed to review its files, pay the claim or notify the insured within thirty days of the refusal?" Answer: Yes.

We arrive at this answer by observing the evolution of Georgia law concerning the correlation of no-fault benefits and workers' compensation benefits. Travelers' refusal to pay basic PIP[2] was based on the contention such benefits were not payable where workers' compensation was paid. The beginning point is the original no-fault statute.

Georgia Laws 1974, p.113, 120. Section 9 provided that no-fault benefits should not be reduced or eliminated by workers' compensation benefits or other similar benefits.[3] This section was challenged in Freeman v. Ryder Truck Lines, Inc., 244 Ga. 80 (259 SE2d 36) (1979). In that case, Freeman, an employee of Ryder was injured in Ryder's vehicle while on the job. Freeman claimed both no-fault and workers' compensation from Ryder, a self insurer. Ryder contended workers' compensation provided the exclusive benefits.[4] Freeman contended section 9, supra, required payment of both benefits. While Ryder put forth an equal protection challenge, this court declined to address the merits of that challenge. Instead, the two statutes were construed in a manner to give effect to both, and avoid the conflict. It was held that section 9 applied to Freeman's own no-fault policy

covering him and his personal vehicle. He could recover no-fault benefits under his own policy notwithstanding receipt of workers' compensation from Ryder. However, Freeman could not recover no-fault benefits from Ryder because workers' compensation was the exclusive remedy against the employer.

In 1979 section 9 was amended to limit its effect. Ga. Laws 1979, p. 594. Under the amendment there was a correlation of benefits where an employer provided, at his expense, benefits for both workers' compensation and no-fault. No-fault benefits were reduced or eliminated by the amount of medical payments and loss of income payments under workers' compensation. An employer did not have to pay both, but an employee was entitled to the maximum benefits of either. Then came Boston Old Colony Ins. Co. v. Brown, 155 Ga. App. 767 (272 SE2d 755)

(1980), which failed to take the 1979 amendment into account and simply followed Freeman to hold that payment of workers' compensation by the employer completely barred a claim by an employee for no-fault benefits against the employer's insurer. We granted certiorari and reversed in Brown v. Boston Old Colony Ins. Co., 247 Ga. 287 (275 SE2d 651) (1981), where we recognized the 1979 amendment had altered section 9. The payment of workers' compensation no longer necessarily eliminated no-fault benefits payable by an employer or its insurer: it merely reduced the amount.

The significant point to realize is Travelers, in this case, denied Doran's no-fault claim during the period after the Court of Appeals rendered its decision in Boston Old Colony, supra, but before we reversed that case on certiorari. The denial was in accord with the decision of

the Court of Appeals and did not lack good faith. See, Government Employees Ins. Co. vs. Mooney, 250 Ga. 760 (300 SE2d 799) (1983).

Doran contends the foregoing does not complete the inquiry into the good faith question. He suggests a lack of good faith when Travelers failed to review its files following our decision in Boston Old Colony, supra. We hold otherwise. The circumstances are analagous to our decisions under the general statute governing penalties for bad faith refusals to pay insurance benefits after demand has been made. OCGA § 33-4-6. We have held that the demand which triggers penalties under that provision must be made at a time when the right to make demand exists or else there can be no bad faith penalty. Life Insurance Company of Georgia v. Burke, 219 Ga. 214 (132 SE2d 737) (1963). Similarly,

a claim must be made under no-fault insurance at a time when it is a valid claim in order to trigger the good faith penalty provision. Under the Court of Appeals' decision in Boston Old Colony Doran's claim was not a valid claim. It is only reasonable to require that the claim should be renewed after it became valid on account of our reversal of Boston Old Colony. We note prompt payment was made when the claim was renewed. There is, as a matter of law, no lack of good faith under these circumstances.

2. The second question is: "Does the $45,000 optional Georgia no-fault insurance coverage imposed by OCGA § 33-34-5, as construed in Flewellen v. Atlanta Casualty Co., 250 Ga. 709 (300 SE2d 673) (1983), apply to an insurance policy issued in Florida to a Florida resident covering a vehicle licensed in Florida that the parties understand will

be used and garaged in Georgia?" Answer: No.

A brief chronological review of our no-fault law sheds light on this question. The original Act, Ga. Laws. 1974, p. 113, at 115, contained section 5(a),[5] which required all policies issued in Georgia to be in accordance with the requirements of the Act. Under this provision the Court of Appeals held the Act to mean that no-fault requirements did not apply to a policy issued in New York even though the insured vehicle was involved in a collision in Georgia. Tamiami Trail Tours v. Bess, 150 Ga. App. 632 (258 SE2d 200) (1979). That is, the statute applied only to policies issued in Georgia and not to policies issued in other states. Even before the decision in Tamiami, supra, the Act was amended to deal with certain policies issued in other states and in Canada. (This amendment did

not apply to Tamiami because the facts of Tamiami pre-dated the amendment.) The amendment was aimed at insurers authorized to transact or transacting insurance in Georgia.[6] As to this category of insurers, it directed that they should include in policies issued in other states or Canadian provinces a provision "which provides at least the minimum coverage required under Section 3(b) of this Act (OCGA § 33-34-4(a) (2))...." if the insured is involved in a motor vehicle accident in Georgia. Ga. Laws, 1976, p. 1513. Section 3(b) is the basic PIP of $5,000. Thus, the original Act applied only to policies issued in Georgia. The amendment extended some requirements of the Act to some policies issued outside Georgia, but not all requirements of the Act to all policies issued outside Georgia. Only out-of-state policies issued to insureds later involved in auto accidents

in Georgia by companies transacting or authorized to transact insurance here were affected. The requirement was that such policies provide minimum PIP coverage of $5,000. The amendment is quite clear in its requirement of only $5,000 minimum PIP coverage because it refers specifically to section 3(b) (OCGA § 33-34-4(a)(2)) and does not refer to the optional coverages ($45,000) found in section 4 (OCGA § 33-34-5).

It is where the policy was issued, and not where the vehicle was licensed or garaged, which is a factor used to determine whether all provisions of the no-fault act apply or only limited portions of the act apply.

3. The third question certified is: "If the answer to Question 2 is no, is the guarantee of equal protection of the laws, Ga. Constitution Art. I, Sec. 1, Para. 2, violated by the denial of the

$45,000 optional no-fault coverage, otherwise available under Flewellen, supra, to a Georgia resident who was injured in the course of his employment in Georgia while operating a vehicle licensed in Florida and insured under a policy issued in Florida to a Florida resident, but that the parties understood would be used and garaged in Georgia?" Answer: No.

In the absence of any showing that the classification between Georgia residents insured under out-of-state policies as opposed to those insured under in-state policies creates a suspect class or infringes upon fundamental rights, Shapiro v. Thompson, 394 U.S. 618 (1969), or otherwise requires heightened scrutiny, Parham v. Hughes, 441 U.S. 347 (1978), we apply the rule adopted in Wilder v. State, 232 Ga. 404 (207 SE2d 38) (1974):[7] "If the legislative purpose is legitimate and the classification drawn has some

reasonable relation to furthering that purpose, the classification passes muster." Here the statutory scheme requires owners of vehicles registered in Georgia to provide certain minimum coverages. OCGA § 33-34-4(a). It requires insurers who issue insurance policies in Georgia to conform those policies to the requirements of the no-fault law including optional coverages. OCGA §33-34-3(a)(1). Requirements relating to optional coverages are specific and require careful administration. Flewellen v. Atlanta Casualty Co., 250 Ga. 709 (300 SE2d 673) (1983). To relieve insurers issuing out-of-state policies from the special administrative burden of optional coverage is a legitimate legislative purpose, and the classification bears a reasonable relation to furthering that purpose. Thus, there is no equal protection violation.

4. The fourth question is: "Under Georgia choice of law rules, does Florida law, which does not provide optional PIP coverage, or Georgia law govern the rights of an injured Georgia resident under an insurance policy issued to a Florida resident in Florida and covering a vehicle licensed in Florida that the parties understand will be used and garaged in Georgia?" Answer: Our answer to the second question demonstrates that Georgia law does not provide optional PIP under the facts of this case. It is unnecessary to answer this fourth question.

Certified questions answered as indicated herein. All the Justices concur, except Smith, J., dissents to divisions one and two.

ENDNOTES

[1]This section provides due dates for payment of benefits. A failure to pay when due, not in good faith, results in a 25% penalty, reasonable attorney fees and punitive damages.

[2]OCGA § 33-34-4 provides compensation to insured injured persons "up to an aggregate minimum limit of $5,000" without regard to fault.

[3]"The benefits payable under this act shall not be reduced or eliminated by any workmen's compensation benefits, medical payments benefits or any other disability benefits, wage loss benefits or hospitalization benefits that the insured person is entitled to receive."

[4]OCGA §34-9-11. "The rights and remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or

next of kin, at common law or otherwise, on account of such injury, loss of service, or death...."

[5]"Section 5...(a) All policies of motor vehicle liability insurance issued in this State must be in accordance with the requirements of this Act, and no insurer shall issue a policy of motor vehicle liability insurance in this State that does not contain at least the minimum coverages required under this Act."

[6]"All insurers authorized to transact or transacting insurance in this State, or controlling or controlled by or under common control by or with an insurer authorized to transact or transacting insurance in this State which issue policies or contracts providing motor vehicle liability insurance coverage, or any of the similar coverage, in any State or Canadian province shall include in such policies or contracts of insurance a

provision which provides at least the minimum coverage required under Section 3)(b) (OCGA § 33-34-4(a)(2)) of this Act with respect to motorists insured under such policies or contracts who are involved in motor vehicle accidents in this State, and notwithstanding any provisions of any such policies or contracts to the contrary all such policies or contracts of insurance shall be deemed to satisfy the minimum requirements of this Act if a motorist insured under such policies or contracts of insurance is involved in a motor vehicle accident in this State." Ga. Laws 1976, p. 1513, at 1514.

[7]We observe that the 1983 Constitution altered the wording of the equal protection provision. In prior constitutions the language was, "Protection to person and property is the paramount duty of government and shall be

impartial and complete." 1976 Constitution, Art. I, Sec. II, Par. III; 1945 Constitution, Art. I, Sec. I, Par, II. but now we have, "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." (Underlined sentence added.) 1983 Constitution, Art. I, Sec. I, Par. II. As it relates to this case and our application of the principal of equal protection, no change has been wrought. We would apply the same principle under all three constitutions making it unnecessary to determine which constitution applies to the facts in this case.

C. The decision of the Eleventh Circuit Court of Appeals:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8566

DENNIS DORAN,

Plaintiff/Appellant,

vs

TRAVELERS INDEMNITY COMPANY,

Defendant/Appellee

Appeal from the United States District Court for the Southern District of Georgia

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(August 8, 1985)

Before KRAVITCH, HATCHETT and ANDERSON, Circuit Judges:

PER CURIAM:

It appearing to the panel that the opinion in the above case dated April 30, 1985, failed to address one of the issues presented by the appellant, said opinion is VACATED and the attached opinion substituted in lieu thereof.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8566

DENNIS DORAN,

Plaintiff/Appellant,

V.

TRAVELERS INDEMNITY COMPANY,

Defendant/Appellee

Appeal from the United States

District Court

for the Southern District of Georgia

(August 8, 1985)

BEFORE KRAVITCH, HATCHETT and ANDERSON,

Circuit Judges.

PER CURIAM

In this diversity case plaintiff Dennis Doran appeals from the grant of a motion for summary judgment in favor of defendant Travelers Indemnity Company.

Plaintiff was involved in an automobile collision while driving a van belonging to his employer and insured by defendant. The collision occurred in Georgia. Although the insurance policy on the vehicle was issued in Florida to a Florida resident covering a vehicle licensed in Florida, the parties understood that the vehicle would be used and garaged in Georgia. Plaintiff sought first to obtain $5,000.00 in benefits under O.C.G.A. § 33-34-1 and §33-34-3(a)(2) for basic no-fault coverage, also known as personal injury protection (PIP). Defendant refused to pay these benefits because plaintiff was already receiving Workers' compensation, basing this determination on a Georgia

Court of Appeals decision. This decision was overturned by the Georgia Supreme Court six weeks later. Over a year after the Supreme Court's decision, Plaintiff renewed his claim for basic PIP benefits and these benefits were promptly paid. Plaintiff also sought $45,000.00 in additional PIP benefits under O.C.G.A. § 33-34-3(a)(2) and § 33-34-5. Defendant refused to pay these benefits.

Doran brought suit in the Superior Court of Clinch County, Georgia, and the Defendant removed the case to federal district court. The complaint sought $45,000.00 in optional PIP benefits, and punitive damages, penalty and attorney's fees for bad faith delay in paying basic PIP benefits. The district court granted summary judgment for the defendant and Doran appealed. We determined that the appeal presented important unresolved questions of Georgia

law and, therefore, certified these questions to the Supreme Court of Georgia. The Supreme Court has made the following determinations:

1. Travelers acted in good faith as a matter of law so as to avoid the sanctions of O.C.G.A. §§ 33-34-6, when it relied upon Boston Old Colony Insurance Company v. Brown, 155 Ga. App. 767, 272 S.E.2d 755 (1980), as a basis for refusing to pay basic no-fault insurance benefits, and, when that case was reversed six weeks after the refusal, it failed to review its files, pay the claim or notify the insured within thirty days of the refusal.

2. The $45,000.00 optional Georgia no-fault insurance coverage imposed by O.C.G.A. § 33-34-5, as construed in Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673

(1983), does not apply to an insurance policy issued in Florida to a Florida resident covering a vehicle licensed in Florida that the parties understand will be used and garaged in Georgia.

3. The guarantee of equal protection of the laws, Ga. Const. art. I, § 1, ¶ 2, is not violated by the denial of the $45,000.00 optional no-fault coverage, otherwise available under Flewellen, supra, to a Georgia resident, who was injured in the course of his employment in Georgia while operating a vehicle licensed in Florida and insured under a policy issued in Florida to a Florida resident, that the parties understood would be used and garaged in Georgia.[1]

In addition, we find no violation of the Equal Protection Clause of the fourteenth amendment of the United States Constitution in Georgia's decision to regulate only policies issued in

Georgia with regard to optional no-fault coverage. This distinction in the Georgia no-fault insurance act does not create a suspect class nor infringe upon a fundamental right, and thus, must only have a rational relationship to a permissible state objective. See, e.g., Parham v. Hughes, 441 U.S. 347, 351 (1979); Dandridge v. Williams, 397 U.S. 471, 485 (1970). The Georgia Supreme Court determined that "[r]equirements relating to optional coverages are specific and require careful administration. Flewellen v. Atlanta Casualty Co., 250 Ga. App. 709, 300 S.E. 2d 673 (1983). To relieve insurers issuing out-of-state policies from the special administrative burden of optional coverage is a legitimate legislative purpose, and the classification bears a reasonable relation to furthering that purpose." Doran v. Travelers Indemnity

Co., No. 41550, slip op. at 9 (Ga.S.Ct. February 27, 1985). We find that this purpose also passes constitutional muster under the U.S. Constitution.

We therefore conclude that the defendant is entitled to judgment as a matter of law. Accordingly, we AFFIRM the district court's grant of summary judgment to the defendant. The Georgia Supreme Court's responses to the certified questions are set forth below.

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[1] We also asked the Georgia Supreme Court:

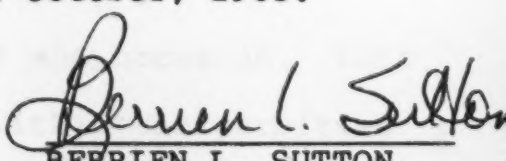
> Under Georgia choice of law rules, does Florida Law, which does not provide optional PIP coverage, or Georgia law govern the rights of an insured Georgia resident under an insurance policy issued to a Florida resident in Florida covering a vehicle licensed in Florida that the parties understand will be used and garaged in Georgia?

The Court found it unnecessary to answer this question because its answer to the second question demonstrated that Georgia law does not provide optional PIP benefits under the facts of this case.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing petition for writ of certiorari and appendix was this day served on the attorney for the Respondent, Bryan F. Dorsey, DICKENS AND IRWIN, 915 South Tower Peachtree Center, 225 Peachtree Street, NE, Atlanta, Georgia 30303 by being deposited in a United States Post Office with first class postage prepaid addressed to counsel of record for the respondent and mailed to him at his address listed above.

This 4th day of October, 1985.



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Petitioner

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AFFIDAVIT OF MAILING

PERSONALLY appeared before the undersigned attesting officer, comes BERRIEN L. SUTTON, who, after being duly sworn, states on oath as follows:

I am a member of the bar of the Supreme Court of the United States. On the 4th day of October, at 11:00 o'clock a.m., forty copies of the petition for writ of certiorari to the United States Supreme Court on behalf of the petitioner was deposited by me in the United States Post Office at Homerville, Georgia on the above-set forth date and occasion. This mailing took place within the permitted time for filing of this petition for writ of certiorari with the Clerk of the Supreme Court of the United States.

This 4th day of October, 1985.

Berrien L. Sutton

BERRIEN L. SUTTON

Sworn to and subscribed
before me this 4th day
of October, 1985.

Becky Rogers

NOTARY PUBLIC
Commission expires:
9/18/88